

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

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No. CR 13-00750-EJD
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SENTENCING MEMORANDUM,
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The Probation Officer believes that Mr. Kiryakoz's other relatives could care for his mother during his confinement. (PSR at p.2.) In an email sent to undersigned counsel (attached as

1 Exhibit A), Mr. Kiryakoz offers further evidence that he is uniquely situated to care for his
2 mother, whose medical needs have grown since the PSR was prepared.

3 In addition to requesting a variance, Mr. Kiryakoz objects to the 14-level increase to his
4 calculated sentence on the grounds that the loss calculation should reflect only the loss attendant
5 to the offense of conviction rather than the loss attributable to an uncharged related offense. Mr.
6 Kiryakoz admitted sending stolen property in interstate commerce. The property in question, a
7 number of bottles of expensive wine, was the product of an uncharged theft. Probation and the
8 government seek to attribute the loss of the entire theft to Mr. Kiryakoz, rather than the value of
9 the wine he admitted transporting. The result is a two-level difference, or a nine-month difference
10 in the low end of either range, 24 months at the level used by Probation, 15 months as argued by
11 the defense.

12 In effect, Probation's recommendation is to vary down the level which the defense
13 contends is the guideline sentence before any variance. The defense respectfully requests the
14 court find that correct adjusted offense level is 12 rather than 14, or if the court finds that 14 is
15 the correct offense level, vary down from a 24 months guideline to a sentence of probation, based
16 on factors related to the defendant's circumstances as permitted by 18 U.S.C. 3553(a), in this
17 case the need to care for his aged mother.

18 Finally, to the extent the government is requesting restitution for wine that was stolen, but
19 not shipped, the defense objects for the reasons cited above with respect to the loss calculation.

20 **II. GUIDELINE CALCULATION AND JUDICIAL DISCRETION**

21 **I. THIS COURT HAS DISCRETION TO IMPOSE A REASONABLE SENTENCE** 22 **BELOW THE CALCULATED GUIDELINE RANGE.**

23 In the wake of *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court has
24 made clear that district courts have discretion to consider all of the characteristics of the offender
25 and circumstances of the offense, and to reject advisory guidelines that are not based on national
26 sentencing data and empirical research, or for some other reason do not provide an appropriate
27 sentence for the individual defendant. See *Spears v. United States*, 555 U.S. 261, 265-266 (2009)
28 (per curiam) (holding that district courts may categorically reject guideline in mine-run cases

1 based on a policy disagreement with the Guidelines); *Rita v. United States*, 551 U.S. 338 (2007);
2 *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).
3 Sentencing courts must calculate and consider the guideline range as a “starting point in
4 sentencing,” but may sentence outside that range if such a sentence is reasonable in light of the
5 factors set forth in 18 U.S.C. §3553(a). *Gall*, 552 U.S. at 49-50. The district court shall not
6 presume that a within-guideline sentence is reasonable. *Id.* at 50; *Rita v. United States*, 551 U.S.
7 338, 351 (2007).

8 Next, this Court must consider the pertinent §3553(a) factors, and decide whether those
9 factors call for a sentence outside the Guidelines. *Gall*, 552 U.S. at 49-50. The sentencing judge
10 is required “to consider every convicted person as an individual and every case as a unique study
11 in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment
12 to ensue.” *United States v. Tadio*, 663 F.3d 1042, 1052 (9th Cir. 2011) citing *Koon v. United*
13 *States*, 518 U.S. 81, 98 (1996). This Court may impose an out-of-guidelines sentence based on a
14 combination of mitigating factors, including those which the advisory guidelines previously
15 prohibited or discouraged by the Guidelines. The Court may consider all “information concerning
16 the background, character, and conduct of [the defendant]...for the purpose of imposing an
17 appropriate sentence.” 18 U.S.C. §3661; *Rita*, 551 U.S. at 364-65 (sentencing courts may
18 consider all factors including age, education, mental or emotional condition, medical condition,
19 employment history, lack of guidance as a youth, family ties, or charitable service). Sentencing
20 courts need not and may not require “‘extraordinary’ circumstances to justify a sentence outside
21 the Guidelines and no courts may use a proportional formula “for determining the strength of the
22 justifications required for a specific sentence.” *Gall*, 552 U.S. at 41. This Court need only find
23 that due to the pertinent factors, the appropriate sentence falls outside the guideline range. See
24 *Rita*, 551 U.S. at 351; *Nelson v. United States*, 555 U.S. 350, 351 (2009).

25 Finally, the over-arching directive in §3553(a) is for sentencing courts to impose a
26 sentence that is “sufficient, but not greater than necessary,” to accomplish the purposes set forth
27 in §3553(a)(2). The authority of this Court to exercise its discretion to consider all the relevant
28 factors and grant sentences below the Guidelines range has a significant impact in this case.

1 If the court determines that a sentence outside the guideline range is justified and
2 reasonable, then it must decide what sentence is warranted, and must adequately explain its
3 reasoning, “to allow for meaningful appellate review and to promote the perception of fair
4 sentencing,” applying a “deferential abuse-of-discretion standard.” *Gall*, 552 U.S. at 50. In *Rita*,
5 the Supreme Court acknowledged that a district court may exercise its discretion to sentence
6 below the Guideline range, based on its own factfinding, because “the case at hand falls outside
7 the ‘heartland,’” because “the Guidelines sentence itself fails properly to reflect §3553(a)
8 considerations,” or because “the case warrants a different sentence regardless.” 551 U.S. at 351.

9 In the present case, the only legal obstacle to the reasoned and compassionate sentence of
10 probation in this case is the mandate of 18 U.S.C. §3553 to avoid unwarranted disparities in
11 sentencing between similarly situated defendants. Mitigating factors addressed by §3553(a)(1),
12 and (2), discussed below, justify a sentence of probation for all three of the reasons cited by the
13 *Rita* court. If the Court agrees with the defense that an out-of-guidelines sentence is appropriate
14 in this case, it is respectfully requested that this Court state its reasons with particularity as
15 required by *Gall*, to demonstrate to the appellate court the reasonableness of the sentence. *Gall*,
16 552 U.S. at 46, 50.

17 II. A SENTENCE BELOW THE GUIDELINE RANGE IS CONSISTENT WITH THE
18 POLICIES STATED THEREIN.

19 A. Mr. Kiryakoz’s Family Obligations and Recent Hardships Support a Sentence of
20 Probation.

21 As the PSR aptly notes, Mr. Kiryakoz devotes a substantial amount of time and energy to
22 the care of his mother, with whom he lives. Mrs. Kiryakoz depends on her son emotionally and
23 financially. He escorts her to medical appointments and serves as her translator since she speaks
24 no English. Since the death of Mr. Kiryakoz’s father on January 3 of this year, Mrs. Kiryakoz has
25 become even more dependent upon her son.

26 In the time since the PSR was drafted, Mr. Kiryakoz and his mother have learned that she
27 suffers from diabetes. (Exhibit A.) This condition explains the limited mobility Mrs. Kiryakoz
28 has been experiencing due to discomfort in her back and leg. Mr. Kiryakoz is currently assisting
with all aspects of her care and anticipates that these responsibilities will grow in light of her new

1 diagnoses. At a minimum, Mrs. Kiryakoz will need daily medication and access to specialized
2 medical care, requiring additional time and financial commitments. (Exhibit A.)

3 In response to the suggestion in the PSR that another family member might care for Mrs.
4 Kiryakoz during her son's confinement, Mr. Kiryakoz notes that there are many hurdles to
5 transferring her care. His nephew, who currently lives with them, will likely be moving closer to
6 his job in Fremont to eliminate his lengthy daily commute. Mr. Kiryakoz's brother has two
7 children and an unpredictable schedule as a sales associate. (Exhibit A.) These obligations make
8 it very difficult for him to accompany his mother to medical appointments and assist with other
9 aspects of her daily care. Having no children of his own and living under his mother's roof has
10 enabled Mr. Kiryakoz to assist her with basic needs whenever he is home, which no one else is in
11 a position to offer at this time.

12 A sentence of probation would allow Mr. Kiryakoz to continue supporting his mother
13 through this difficult time and help her meet her medical needs. Imprisonment would represent a
14 tremendous hardship on the whole family. These are truly extraordinary circumstances involving
15 an individual defendant for whom this crime was an aberration.

16 B. Probation Achieves the Sentencing Goals Set Forth in the Guidelines.

17 Sentencing factors 3553(a)(2)(A)-(D) support a sentence below the guidelines range.
18 Those factors are analyzed as follows:

19 A) *Whether the sentence reflects the seriousness of the offense.* The most significant aspect of
20 this factor is the meaning of the "offense." Sentencing is an individualized process and in
21 conspiracy case such as this one, the consideration of the offense is limited to the individual
22 defendant's role. Here, Mr. Kiryakoz has admitted to conspiring to ship stolen wine. He did
23 not steal or conspire to steal the wine. Co-defendant Georgis planned all of the thefts with
24 other unindicted co-conspirators and communicated with the unindicted buyer, who arranged
25 for transport using his personal shipping accounts. The government now seeks to punish Mr.
26 Kiryakoz for the thefts after declining to prosecute him for those crimes. Mr. Kiryakoz
27 respectfully requests that this Court consider only his conduct and only the evidence
28 underlying Count 1 as the bases for his sentence.

1 B) *Whether the punishment affords adequate deterrence to criminal conduct.* Mr. Kiryakoz has
 2 no history of stealing or conspiring with others and he is deeply ashamed of his conduct,
 3 which overshadowed the last months of his father's life. He acknowledges that his
 4 participation in the shipment of stolen goods harmed businesses in his own community as well
 5 as his own family. Since his arrest, Mr. Kiryakoz has been caring for his parents and pursuing
 6 his career in construction. As demonstrated in the attached letters of support (Exhibit B), also
 7 provided to Probation, his professional and family commitments are unwavering. Mr.
 8 Kiryakoz knows that any violation of probation will further jeopardize his professional
 9 reputation and put his mother's health and wellbeing at risk. Therefore, a criminal conviction
 10 coupled with probation and a restitution obligation are more than adequate to deter Mr.
 11 Kiryakoz from committing any future crimes.

12 C) *Whether the sentence protects the public from future crimes of the defendant.* Mr. Kiryakoz is
 13 45 years old. He has one misdemeanor conviction from 11 years ago. All of the available
 14 evidence indicates that Mr. Kiryakoz is dedicated to his work and family and that his
 15 involvement in the charged crimes was an aberration. His conduct since the time of his arrest
 16 has confirmed this. There is no indication that he poses any further threat to the public.
 17 Therefore, a sentence of probation is appropriate.

18 D) *Whether the sentence provides the defendant with needed education or vocational training,*
 19 *medical care, or other correctional treatment in the most effective manner.* Mr. Kiryakoz
 20 needs no further education, vocational training, or medical needs that might be met through a
 21 longer period of confinement. His employer alludes to Mr. Kiryakoz as a "skilled craftsman."
 22 and advocates for leniency on his behalf so he may continue to work. (Exhibit A at pp.5-6.)

23 III. MR. KIRYAKOZ OBEJECTS TO LOSS AND RESTITUTION CALCULATIONS 24 THAT INCLUDE THE VALUE OF WINE THAT WAS NEVER SHIPPED.

25 A. The Loss Directly Caused By Mr. Kiryakoz Is Limited to the Shipped Wine.

26 The PSR correctly notes that while the guideline for a violation of 18 U.S.C. section 371
 27 is USSG section 2X1.1, the conduct described in Count 1 corresponds to the guideline 2B1.1—
 28 Transportation of Stolen Goods—as contemplated in the Plea Agreement. The PSR also correctly

1 calculates the value of the wine shipped at \$374,679. (PSR at p.1). However, in its final
2 calculation the PSR incorrectly places this figure at \$871,447. (PSR at p.7). Mr. Kiryakoz agrees
3 that the lower figure accurately reflects the value of the contraband with which he personally
4 came into contact. He was not involved with the wine thefts or charged with that crime.
5 Consequently, the value of the stolen wine that was never shipped should not be factored into his
6 calculated sentence. Consequently, the correct adjusted offense level for loss is 12 rather than 14.

7 B. Mr. Kiryakoz Objects to the Restitution Amount

8 A dispute as to the proper amount of restitution must be resolved by the district court by a
9 preponderance of the evidence. 18 U.S.C. § 3664; *United States v. Waknine*, 543 F.3d 546, 556
10 (9th Cir.2008) (citing 18 U.S.C. § 3664(e); *United States v. Clayton*, 108 F.3d 1114, 1118 (9th
11 Cir.1997)). As with the loss calculation, Mr. Kiryakoz disputes that he is criminally liable for
12 restitution attributable to the wine that was stolen, but never shipped. The defense objects to any
13 restitution order that includes contraband Mr. Kiryakoz had no role in obtaining and with which
14 he never came into contact. The defense request that the court impose \$374,679.00 in restitution.

15 **CONCLUSION**

16 Mr. Kiryakoz humbly and respectfully accepts responsibility for his conduct and asks that
17 the Court impose a sentence of probation so that he may continue to care for his ailing mother.
18 Consistent with the policies underlying the guidelines, he further objects to any restitution or loss
19 calculation that includes the value of wine that was stolen, but never shipped.

20 Respectfully Submitted,

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22 Jay Rorty

23 Attorney for Davis Kiryakoz
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